No. 454

Supreme Court of the United States.

OCTOBER TERM, 1940.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF LUIGI LUCHINI
ET AL.,
PETITIONERS,
v.
THE FERRO CONCRETE CONSTRUCTION
COMPANY ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

Your petitioners, James Luchini and Luigi Luchini, doing business as L. Luchini & Son, and the Milford National Bank & Trust Company, all of Milford in the Commonwealth of Massachusetts, intervening petitioners in the above-entitled case, pray that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the First Circuit directing a verdict for the respondents, Ferro Concrete Construction Company and the Seaboard Surety Company, notwithstanding the verdict of the jury in favor of the aforesaid intervening petitioners, James Luchini *et als.*

Statement of Matter Involved.

The Luchinis were owners of a granite quarry in Milford, Massachusetts. They had a written subcontract with the defendant Ferro Company to furnish and deliver on trucks at Newport, Rhode Island, fabricated and finished, ready to set, the granite necessary to complete an addition to the Naval War College, for the construction of which the defendant had a general contract with the Navy Department. The subcontract price was $30,000, payable in such sums as were equal to 90 per cent of all labor and materials placed in position, and for which payment had been made to Ferro by the government. Deliveries were to start on or about June 1, 1933, and to be completed by the end of July, 1933 (R. pp. 525 and 526, Exhibit 11).

The subcontract was dated March 25, 1933. But (Q. 41, p. 47), because of unforeseen delays (Luchini, R. p. 143, Qs. 750 to 751; p. 48, Q. 44; Exhibit J; Exhibit 6, p. 48; Exhibits 7, 8 and 9, pp. 50, 51, 52), it was not signed until June 1, 1933, and the plans from which the plaintiffs were to fabricate the stones, of which there were around ten thousand stones (Luchini, R. p. 55, Q. 83), were not approved by the Navy Department until the latter part of June, 1933 (Luchini, R. p. 58, Qs. 97 to 100; p. 58, Qs. 108 to 117).

The chief cause for delay in the performance of the contract, as well as the cause for the change in the agreement upon which the suit is based, was due to Luchini's inability to borrow money to go on with the contract until money would come due to them under the contract.

Luchini & Son's bid was made February 21, 1933. This was before the bank holiday (R. p. 44, Qs. 16 to 23).

It was accepted, after reduction, by telephone, March 25, 1933. (This was during the bank holiday.) A bond for its performance was to be given. But the formal contract was not signed (R. p. 46, Q. 31; p. 113, XQs. 533 to 537).

Luchini was not able to get a bond. He asked whether he should quit or continue (R. p. 48, Q. 44; p. 143, XQs. 750 to 751; Defendant's Exhibit J).

Defendant told him to go on (R. p. 48; Plaintiffs' Exhibit 6).

Defendant pressed Luchini to sign the contract (R. p. 50, Q. 55; Plaintiffs' Exhibit 7; pp. 51, 52, Q. 61; Plaintiffs' Exhibit 9).

The very day (May 27th) that Luchini sent the signed contract he asked for money not yet due under the contract (R. pp. 144 to 145; Ferro Exhibit K, p. 145).

Ferro returned to Luchini its signed contract on June 1st (R. pp. 52 to 53, Q. 66; Plaintiffs' Exhibit 10).

The contract provided for delivery of fabricated stone at Newport to start June 1st and be completed by July 31st (R. p. 53, Qs. 67 to 70; Plaintiffs' Exhibit 11).

This was impossible, and both parties knew it. The blueprints were not approved until June 15th, June 23d and June 24th. Fabrication could not commence until afterward (R. p. 58, Qs. 97 to 100; p. 58, Qs. 108 to 117).

There was never any new date set either for commencement or completion of deliveries.

The first delivery of fabricated stone to Newport was made July 25th (R. p. 61, Qs. 136 to 138).

About July 25, 1933, Loring, secretary, treasurer and vice-president of Ferro, came on from Cincinnati and demanded the plaintiffs increase production and hasten the deliveries, which the plaintiffs could not do with their present resources and equipment (Luchini, p. 61, Q. 144; p. 62, Qs. 147 and 148; p. 64, Qs. 162 and 167; Starr, p. 391, XQs. 317 to 319).

At that conference Loring knew of Luchinis' financial difficulties. But the Ferro Company did not cancel the contract.

Prior to that the company had advanced to the Luchinis money which was not due under the contract. On July 14,

1933, it had sent $1500 on the request of Starr (R. p. 149, Qs. 791, 792; p. 538, Defendants' Exhibits L and M). Again, on July 20th, $1000 (R. p. 152, XQ. 812; Defendants' Exhibit N; p. 62, Qs. 149 to 160).

Production not coming along after July 25th, Loring, on August 1, 1933 (R. p. 135, Exhibit O and XQ. 819), wired Luchini: "What can be done to get minimum requirements"; August 4th, Luchini wired (R. p. 65, Exhibit 12): "Must pay off to-morrow . . . funds must be telegraphed to be of use in this emergency." August 5th, Luchini again wired (R. p. 157, Exhibit P).

Instead of wiring money, Loring sent Starr up (R. p. 466, Q. 244), as he knew if Luchini doubled production that was the reason Luchini wanted the money; and he further told Starr: "Do something to get this granite out" (XQ. 247), and Loring said (XQ. 250): "I was telling him to go and get all the things out that was necessary." So, on August 8th, Starr came to the quarry to see Luchini.

After a talk, Mr. Starr said: "If it was money that was worrying us, why, that could be fixed up, provided we would accept a man . . . put in the plant there to take care of their interests and to see that the payroll money or their advances would be expended for them. . . . Luchini "was to do the spending" (Testimony of Luchini, R. p. 66, Qs. 175 and 176).

Starr thereupon, upon his own initiative, wrote out in his own handwriting a paper dated August 8, 1933, by which Luchini agreed to permit one of Ferro's men to go into the plant to expedite the work (Luchini, R. p. 66, Qs. 175 and 176; Starr, p. 365, Q. 120). It is to be noted that it was expressly agreed that such action was not in any way intended "to interfere with Luchini's general supervision and direction of the work."

After August 8th there was very little, if anything, of importance left of the original agreement dated March 25,

1933, except that defendant was to pay $30,000 when the work was done. The dates June 1st for commencement, and July 31st for completion of deliveries of stone on the work at Newport had been eliminated and no new dates for completion had been fixed. By the agreement of August 8th the method of money payments had been changed.

The agreement dated March 25, 1933, contained a provision for defendant to take over and operate the plant under certain conditions (R. p. 528). But defendant never attempted to operate under this. The "conditions" did not exist and defendant never gave Luchini notice in writing as required (R. pp. 67, 68, Qs. 187 to 189; p. 461, XQ. 207).

Luchini and Starr made the agreement of August 8th instead.

This latter agreement (R. p. 67, Exhibit 13) had a provision which read that such action "is not intended in any way to interfere with L. Luchini & Son's general supervision and direction of the work." But Loring, vice-president, secretary and treasurer of Ferro, put a man (Lorimer) in the plant who ignored the provisions of this agreement and took over generally the plaintiffs' plant, adding employees and incurring indebtedness without the consent of the plaintiffs (Luchini, p. 69, Qs. 194 to 201; Sesona, pp. 231, 232, 233, Qs. 109 to 141).

The plaintiffs then complained to Starr that, in violation of the agreement, things had been taken out of their hands by Lorimer; that the payroll was being doubled, the machinery, trucks and equipment were being increased; that the defendant was getting the use of everything the plaintiffs had and charging everything against the $30,000; and that they would not go on with that arrangement (Luchini, pp. 70 and 71, Qs. 209 to 214; Starr, p. 372, Qs. 169 to 172). This was about two weeks after August 8th, the date of the agreement.

In reply to the complaint, Starr said: "We can't change now and you go ahead. You do all you can and I will come with you and if necessary we will go together to these equipment places and I will tell them we will see they get paid . . . and I will see that you get paid for your trouble and pay you what it is worth to do the job."

In pursuance of that agreement, the defendant held on to the operation of the plant under Lorimer, increased the equipment and overhead charges, and incurred obligations without limitation so they could get out the stone (Luchini, R. p. 71, Qs. 216 to 250; Cotter, p. 201, Q. 48; Lancaster, p. 212, Q. 19; Sesona, Records of Work, pp. 226 and 227, Qs. 54 to 62 *et seq.*). The last delivery was made on November 22, 1933. In the meantime, Ferro sent weekly the urgent, current costs of getting out the stone, amounting to $33,892.73 (Sesona, R. p. 252, Q. 324), but on receiving the last shipment refused to pay any more (Exhibit Z, p. 543). There was undisputed evidence that the fair value of the work, materials, equipment and use of the plaintiffs' plant by the Ferro Company was $55,872.08 (Sesona, R. p. 252, Q. 321), and this action was brought to recover the balance due.

At the close of plaintiffs' evidence, Ferro filed a motion for a directed verdict, which was denied. This question was again called up at the close of all the evidence and after argument was again denied. After six trial days, the case was submitted unconditionally to the jury and the jury returned a verdict for the plaintiffs for $27,282.09, including interest, $21,979.35 of which was principal debt. After the verdict, Ferro moved (under Rule 50 of Rules of Civil Procedure for the District Courts) to set it aside and to have judgment entered in accordance with its motion for a directed verdict. The trial Court denied the defendant's motion (pp. 564-565), saying in part that there was evidence "overwhelmingly in favor of Petitioners." It also denied defendants' motion for a new trial.

Ferro appealed from the judgment. Between the time of the trial and the hearing on appeal, the trial judge had been elevated to the Circuit Court of Appeals, and, by reason of his having heard the case below, was ineligible to hear the case. The case was argued before two judges (one of whom had been retired, but who was recalled for the purpose) and the briefs submitted to a District Court judge as the third member.

On June 4, 1940, an opinion was handed down setting aside the verdict and the judgment, and ordering judgment for the defendants and remanding the case to the District Court for a further trial on the defendants' claim of overpayment. The basis for the decision rested *on the ground that there was no evidence that Starr had any authority, express or implied, to modify the original subcontract, and that the record was barren of any evidence of ratification of what Starr did.* On June 19, 1940, the plaintiffs filed a petition for rehearing. On June 24, 1940, the Court entered an order denying this petition for rehearing.

The petitioners now bring this their petition for writ of certiorari.

Statement of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. sec. 344(b); and under 28 U.S.C. sec. 347(a); and under 28 U.S.C. sec. 723(c).

Questions Presented.

Did the Circuit Court of Appeals err in directing judgment for the defendants, notwithstanding the verdict of the jury for petitioners, and in so doing deprive the petitioners of their right of trial by jury guaranteed by the Constitution of the United States?

Sub-points:

1. Did the Court err—

(*a*) In finding that there was no evidence of Starr's express authority from the defendant to make the agreement pleaded and proved by petitioners? and

(*b*) In finding that the question whether Starr acted within the apparent scope of his authority was one of law for the Court and not of fact for the jury? and

(*c*) In failing to apply the applicable decisions of this Court that the defendant was charged with the knowledge of its agent, Starr, gained while acting in the course of his employment or within such a short time prior thereto that of necessity such knowledge must have been in his mind when he was so acting in the course of his employment as superintendent of construction?

2. Did the Court of Appeals err in directing judgment for defendant, notwithstanding verdict for the petitioners, in disregard of the issue raised by petitioners' first replication to respondents' third plea, that an implied contract arose from the circumstances pleaded under the local laws of Massachusetts, the state where the contract was made, obliging respondents to pay petitioners the quantum meruit value of the materials and labor furnished the respondents, which contract arose, not from any agreement made by Starr, but in consequence of respondents' violation of the agreement made August 8, 1933?

3. Did the Circuit Court of Appeals err in holding that Rule 50 of the Rules of Civil Procedure for the District Courts of the United States authorizes entry of judgment contrary to the verdict of the jury upon the record in this case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The writ should be allowed because, to reach its decision to direct judgment contrary to the verdict of the jury, the Court analyzed evidence from which reasonable men might draw different conclusions, and made its own decision that Starr, the agent for Ferro, had no authority to make the contract alleged in the second replication to respondents' third plea and by so doing it usurped the function of the jury and thus deprived petitioners of their constitutional right of trial by jury.

And further, because the Court disregarded the issues raised by the pleadings and confined its discussion to what it termed lack of or insufficiency of evidence to establish the authority of this agent, Starr, to make the contract in proof. At the close of the evidence at the trial the respondents had made their motion to direct a verdict in their favor, but the trial Court, upon that motion, decided all the legal points raised and submitted the case to the jury unconditionally. The Court did not reserve the question of the sufficiency of the evidence, or any other question, for later consideration; so there was no legal question of sufficiency of the evidence before the Circuit Court of Appeals upon which it could direct a judgment contrary to the verdict of a jury.

The decision of the Circuit Court of Appeals was contrary to petitioners' right of trial by jury as defined by this Honorable Court in the cases of *Slocum* v. *N.Y. &c. Co.*, 228 U.S. 376, and *Baltimore &c. Line* v. *Redman*, 295 U.S. 654.

And further because the Court, in reaching its decision to direct a judgment contrary to the verdict of the jury, failed to apply to the evidence the applicable decisions of this Honorable Court that a principal is charged with the knowledge of his agent acquired just prior to or while acting as agent in the course of his employment.

And further because the Court's decision disregarded the issue, raised by the first replication filed by the petitioner to respondents' third plea, that the circumstances alleged, and in support of which evidence had been offered, created an implied contract or obligation upon the part of the respondent to pay for the labor and materials furnished upon a quantum meruit basis. Under this issue the implied contract did not arise from the contract nullified by the Court's decision, but did arise from circumstances following the breach made by respondent of the prior agreement dated August 8, 1933. (This agreement of August 8th was an admitted modification or change of the original agreement dated March 25, 1933, and was also made by Starr.) It was the claimed breach of this agreement of August 8th that led up to the making of the agreement nullified by the Court's decision. Under this issue of the implied agreement, the finding by the Court that Starr had no authority to make the *express* agreement nullified by its decision became immaterial, and was not decisive of the rights of the parties, even if correct. The ruling of the Circuit Court of Appeals directing a judgment contrary to the verdict of the jury was in conflict with the local decisions of the State of Massachusetts, where the contract was made—that of *Sherman* v. *Buffinton*, 228 Mass. 139.

And further because the Circuit Court of Appeals erroneously claimed as its authority for directing judgment for respondents, notwithstanding a verdict of the jury for the petitioners, Rule 50 of the Rules of Civil Procedure in the District Courts of the United States, and in so doing has placed a construction on that rule which, if correct, would render the rule in violation of the right of trial by jury under the Seventh Amendment to the Constitution of the United States. This rule should be construed by this Honorable Court.

Wherefore it is respectfully requested that this petition for a writ of certiorari be granted; that said judgment may be reversed and that judgment upon the jury's verdict may be directed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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